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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 424

W. B. CHERRY et al.,
Petitioners,

v.

HATTIE BRAZIER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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HATTIE BRAZIER,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

W. B. Cherry, Zachry T. Mathews, Randolph McDonald, Howard Lee, Shirah Chatman and The Fidelity and Casualty Company of New York respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW.

The opinions of the District Court appear in the record at pages 25-30 and 29-43. They are reported, under the name of Hattie Brazier, Individually and as Administratrix of the Estate of James Brazier, v. W. B. Cherry, et al., at 188 F. Supp. 817-821). The opinions of the Court of Appeals (App., infra, pp. 18, 34) are to be reported, under the name of Hattie Brazier v. W. B. Cherry, et al., at [not yet (August 31, 1961) reported].

JURISDICTION.

The judgment of the Court of Appeals was entered on July 7, 1961. A timely motion for rehearing was denied July 28, 1961.

The jurisdiction of this Court is invoked under 28 United States Code 1254 (1).

The judgment sought to be reviewed is not final in the sense that litigation between the parties is thereby ended, but such judgment is final as to an important and clear cut issue of law, which is fundamental to the further conduct of the case, and which, if the position of the petitioners is sustained, would render void the judgment sought to be reviewed, and conclude the litigation. **American Construction Co. v. Jacksonville, T. & K. R. Co.**, 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486; **United States v. General Motors Corp.**, 323 U. S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311; **Land v. Dollar**, 330 U. S. 731, 734, n. 2, 67 S. Ct. 1009, 91 L. Ed. 1209; **Larson v. Domestic & Foreign Commerce Corp.**, 337 U. S. 682, 685, n. 3, 69 S. Ct. 1457, 93 L. Ed. 1628.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals correctly decided that the intended scope of the Federal Civil Rights Acts (42 United States Code 1981, 1983, 1985 (3), 1986 and 1988) permitted annexation to such Civil Rights Acts of statutes of the State of Georgia, which state statutes have been declared, with uniformity by the appellate courts of that State, to create substantive rights rather than to provide procedural processes.

a. Whether the judgment of the Court of Appeals is contrary to the specific language of such Civil Rights Acts.

b. Whether such judgment is contrary to a desirable construction providing uniform operation of such Civil Rights Acts in the several States.

c. Whether such judgment is contrary to a desirable construction that would avoid invalidity or serious questions of invalidity.

2. Whether, independently of Georgia statute law, the Federal Civil Rights Acts, can afford, to the complainant below, the judgments sought by her.

3. Whether, with or without Georgia statute law, the courts below had jurisdiction in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article 1, Section 1 of the Constitution of the United States:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article XIV, Section 1 of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article XIV, Section 5 of the Constitution of the United States:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

28 United States Code 1343:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8;
>
> "(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 47 of Title 8 which he had knowledge were about to occur and power to prevent;
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens

or of all persons within the jurisdiction of the United States."

28 United States Code 1391 (c):

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

42 United States Code 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 United States Code 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 United State Code 1985 (3):

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving,

either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 United States Code 1986:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on

the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

42 United States Code 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

Georgia Code 3-505:

"No action for a tort shall abate by the death of either party, where the wrongdoer received any bene-

fit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff; and in case of the death of the defendant, shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before suit shall have been brought against him, the personal representative of such wrongdoer in such capacity shall be subject to suit just as the wrongdoer himself would have been during his life; providing that there shall be no punitive damages."

Georgia Code 105-1302:

"A widow, or, if no widow, a child or children, minor or sui juris, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence."

STATEMENT.

This action was brought in the United States District Court for the Middle District of Georgia, by Hattie Brazier, individually and as administrator of her husband's estate, and against the petitioners here. Damages were sought, under the Civil Rights Acts, for injuries sustained in an alleged assault upon him by the individual defendant police officers, and for his consequent death (R. 2, et. seq.). In the same action, recovery of $10,000 was sought of a corporate surety, The Fidelity and Casualty Company of New York, on the bond of one of the individual defendants (R. 7, 16).

Jurisdiction of the court was alleged to be conferred by the Fourteenth Amendment and by all the Federal statutes set forth hereinabove, save 42 United States Code 1986, 1988. Neither of these last statutes were alleged as the basis of jurisdiction.

The petitioners filed motions to dismiss the complaint (R. 10-14) and as the complaint was thereafter amended (R. 20-23). The court granted such motions and, with the order of dismissal, rendered an opinion (R. 25-30).

The plaintiff filed a "Motion for Reconsideration" (R. 31-32).

The District Court filed a second opinion in connection with its order denying the motion for reconsideration (R. 39-43).

The Court of Appeals, with one judge dissenting, reversed (App. p. 18 infra). A petition for rehearing was denied by the same three-judge panel, again with one dissent (App. p. 38 infra).

REASONS FOR GRANTING THE WRIT.

1. The questions presented are, insofar as petitioners and their counsel are aware, ones of first impression upon this Court.

2. The questions presented are of far reaching importance in the interpretation and enforcement of the Federal Civil Rights Acts.

3. Resolution of the questions presented may well avoid the necessity of "constant adjudication of the respective boundaries of state and federal competence" in non-diversity cases.

4. Resolution of the questions presented may well define the limits of interstitial additions of modes of procedure as opposed to judicial legislation of substantive law.

5. It is the opinion of the petitioners, and of their counsel, that the judgment of the Circuit Court is contrary to the rationale of the decision of this Court in **Michigan Central R. Co. v. Vreeland,** 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417.

6. The questions presented are important questions of federal law which have not been, but should be, settled by this Court.

To paraphrase, e converso, the statement of Mr. Justice Black in **Garrett v. Moore-McCormack Co., Inc. et al.,** 317 U. S. 239, 63 S. Ct. 246, 249, 87 L. Ed. 239:

> "We do have in this case (a non-diversity case), an effort of the Federal Court to enforce rights rooted in State law."

Through the vehicle of 42 United States Code 1988, the Court of Appeals added, to the Federal Civil Rights Acts, statutes of the State of Georgia (Georgia Code 3-505 and 105-1302), which Georgia statutes have been consistently held, by the appellate courts of the State, to confer substantive rights rather than to afford procedural remedies. **Spradlin v. Georgia Ry. and Electric Company,** 139 Ga. 575, 77 S. E. 799; **Biddle v. Moore,** 87 Ga. App. 524, 74 S. E. 2d 552.

This is the real predicate of the judgment of the Court of Appeals, although, in its opinion (App. p. 18 infra), the Court cited the cases of **Just v. Chambers,** 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903 and **Cox v. Roth,** 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 903. Neither of these cases are apposite here, for there the Congress had not spoken as to what Federal causes of action were to survive, nor had the Congress delineated (as it has here in 42 United States Code 1988) the character of laws to be "borrowed" from the States. In **Cox v. Roth,** this Court interpreted the meaning of the Jones Act and the Federal Employers'

Liability Act to **themselves** provide for survival in the event of the death of the tort feasor. Here, the language of the Congress forecloses such interpretation. In **Just v. Chambers**, involving a maritime tort, it was not revealed whether, as interpreted by the Florida appellate courts, the adopted state statute was of substantive or procedural character. Furthermore, as pointed by the Court, State law, even of substantive character, has, traditionally, been allowed to modify or supplement the maritime law.

Nor will the common law of Georgia furnish support for the judgment of the Court of Appeals, for it is quite clear that such law is to be determined as of May 14, 1776. **Harris v. Powers**, 129 Ga. 74, 58 S. E. 1038. It comprehends the English statute of 4 Edw. III c. 7, but does not include Lord Campbell's act or the survival of causes of action for injury to the person. **Davis v. Atlanta Gas Light Co.**, 82 Ga. App. 460, 466, 467, 61 S. E. 2d 510. Seemingly, "Georgia common law" and "Federal Common Law" (if any exists) are in accord (**Moore v. Backus**, 78 Fed. 2d 571).

The Civil Rights Acts were all adopted within a short span of years (1861-71) during and following the War Between the States. It is difficult to believe that the Congress over-looked or failed to legislate upon any facet of the field that could be persuaded. To the contrary, the Congress did, in all reasonable probability, legislate with care and precision.

The specific language of 42 United States Code 1986, ("if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one . . .,") is, we contend, exhaustive of the causes of action which survive and preclude those sought to be asserted here. Expressio

unius est exclusio alterius. We are aware that Federal courts have sparingly used this cardinal of construction when the acts are widely separated in time of passage. But that is not the case here where the span of years are short and the pattern of legislation has a single purpose.

The specific language of 42 United States Code 1988 ("in all cases where they (laws of the United States) are not adopted to the object, or are deficient in the provisions necessary **to furnish suitable remedies** and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State **wherein the court having jurisdiction of such civil or criminal cause is held,** so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, . . ."), does, we contend, of itself reject the construction found by the Court of Appeals (Language in parentheses and the emphasis is ours).

Moreover, we believe that our interpretation of the meaning of these statutes is fortified by the language of the proposed but rejected "Sherman Amendment" of 1871. The pertinent words of that amendment are "shall be liable to pay **full compensation** to the person or persons damnified by such offense **if living, or to his widow or legal representative if dead** . . ." (Emphasis is ours). It is only in this rejected amendment and in 42 United States Code 1988, quoted above, that the significant and obviously considered words "legal representatives" appear.

Aside from all other questions, we contend that the specific words of the Federal Civil Rights Acts, and the surrounding legislative history, preclude the construction of the Court of Appeals. (We do not believe that any of the causes of action asserted by the complaint will lie, but, if in error on this score, we contend, in the alterna-

tive, that any cause of action that she may have is limited to a maximum of $5,000, and does not extend to "full compensation" under Georgia Code 3-505 or to "full value of life" under Georgia Code 105-1302, as decided by the Court of Appeals).

It has been repeatedly held that 42 United States Code 1988 (formerly 28 U. S. C. 729) applies only to procedural matters. **Scaffidi v. United States** (First Circuit), 37 Fed. 2d 203, 207; **Schatte, et al. v. International Alliance of Theatrical Stage Employees, etc.**, 70 F. Supp. 1008, affirmed per curiam 165 Fed. 2d 216 (Ninth Circuit); **In Re Stupp**, 23 Fed. Cas. No. 13,563, page 296; **Dyer v. Kazuhisa**, 138 F. Supp. 220.

A similar ruling as to its progenitors (the Judiciary Act of 1789 and the Crimes Act of 1790) was made in **United States v. Reid**, 12 How. 361, 365, 13 L. Ed. 1023.

That Congress used the words "suitable remedies" in their usual connotation of "modes of procedure" is emphasized by the fact that the statutes to be adopted were lex fori rather than lex loci.

We believe that the reasoning of the Court in **Chelentis v. Luckenbach S. S. Company, Inc.**, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 and **Garrett v. Moore-McCormack Co., et al.**, supra, lend support here.

It is submitted that the interpretation of these Federal statutes as found by the Court of Appeals does likely result in the non-uniform application of the Civil Rights Acts in the several States and does call into question serious questions of constitutional law.

For one sovereign to adopt, in futuro, the procedural processes of another may be one thing. However, to incorporate, by reference, substantive law, yet to be passed, is quite another.

The majority rule of the courts of the several States is that a Federal statute, as then extant, may, by reference, become a part of a state statute, but any attempt to adopt such statutes, as they may thereafter be modified or changed, is unconstitutional and void.

Such is the ruling of **State v. Urquhart** (Wash.), 310 P. 2d 261, 265; **Brock v. Superior Court** (Cal.), 71 P. 2d 209; **Florida Industrial Comm. v. State** (Fla.), 21 So. 2d 599; **Florida Industrial Comm. v. Peninsular L. Ins. Co.** (Fla.), 10 So. 2d 793; **State v. Webber** (Me.), 133 A. 738; **State v. Gauthier** (Me.), 117 A. 588; **In re Opinions of the Justices** (Mass.), 133 N. E. 453; **Dearborn Ind. Inc. v. City of Dearborn** (Mich.), 49 N. W. (2) 370; **Smithberger v. Banning** (Neb.), 262 N. W. 492; **Holgate Bros. Co. v. Bashore** (Pa.), 45 Dauph County 274; **Santee Mills v. Query** (S. C.), 115 S. E. 202; **Nostrand v. Balmer** (Cal.), 335 P. 2d 17; **Seale v. McKennon** (Ore.), 336 P. 2d 345; **Dawson v. Hamilton** (Ky.), 314 S. W. 2d 535; **Danveger v. Staats** (N. Y.), 196 N. E. 61; **Featherstone v. Norman**, 170 Ga. 370, 153 S. E. 58.

Of similar import, relating to the "time status" of statutes adopted by reference, are **Franklin v. United States**, 216 U. S. 559, 30 S. Ct. 434, 54 L. Ed. 615 ... ; **United States v. Paul**, 6 Pet. 141, 8 L. Ed. 348 ... ; **United States v. Barney**, 24 Fed. Cas. 1011; **United States v. Barnaby**, 51 Fed. Rep. 23; **Kendall v. United States**, 12 Pet. 524, 9 L. Ed. 1181, 10 L. Ed. 317; **In re Heath**, 114 U. S. 92, 12 S. Ct. 615, 36 L. Ed. 358; **United States v. Reid**, 12 How. 361, 365, 13 L. Ed. 1023 ... ; and, after **Rosen v. United States**, supra, **Holmes v. United States**, 269 F. 96 and **Scaffidi v. United States**, supra.

The theory of these cases is that the adopted statute becomes an integral part of the adopting statute, as of the time of exercise of the legislative function and passage of the adopting statute. Many are further based upon the

proposition that to adopt later modifications of the adopted law would violate state constitutional provisions similar to that of the Federal Constitution (Article 1, Section 1).

The foundations of Georgia Code 105-1302 are state statutes adopted and appearing in Georgia Laws for the years 1850, 1855-56, 1878-79, and 1924. However, until the year 1887, a widow had no cause of action, except as to railroads and druggists, for the homicide of her husband, unless the negligence was criminal in nature. **Cottingham v. Weekes,** 56 Ga. 201. Furthermore, and until 1895, the widows' cause of action was conditioned upon her prosecution of the offender or the showing of good cause (an allegation, "of the non-residence of the widow, her poverty and her ignorance of who the real felon is," being insufficient) for not having done so. **Sawtell v. The Western & Atlantic Railroad Company,** 61 Ga. 567.

Georgia Code 3-505 is based upon statutes enacted in the years 1889, 1935 and 1952. Prior to 1952, the code sections and the statutes had no application in instances where the injured party died before instituting suit, and the Georgia "common law" applied. **Smith v. Jones, Adm.,** 138 Ga. 716, 76 S. E. 40; **Davis v. Atlanta Gas Light Co.,** supra.

So it is that neither Georgia Code 3-505 nor 105-1302, could have, at time of passage of the Federal Civil Rights Acts, afforded comfort to the complainant.

The law of Georgia, as hereinbefore cited and recited, is clear that, not only is Georgia Code 105-1302 "substantive" in character, but it affords a new cause of action, separate, independent and apart, from any that the injured person may have had, if continuing in life.

The law of Georgia, as hereinbefore cited and recited, is equally clear that, prior to the amendment of 1952, Georgia Code 3-505 had no application where the action

was not pending, and that the amendment of 1952 was "substantive" in character and not remedial. The amendment of 1952 added the words, "causes of action," to Georgia Code 3-505. These words have a well-defined meaning in the jurisprudence of the State. In **Alexander v. Dean,** 29 Ga. App. 722, 116 S. E. 643 (affirmed on certiorari, 157 Ga. 280, 121 S. E. 238) it was held: " 'An action is merely the judicial means of enforcing a right,' and differs from **a cause of action** in that the latter **is the right itself**" (Emphasis is ours).

In **Garrett v. Moore-McCormack Co., Inc., et al.,** supra, this Court, in a Jones Act case brought in a state court, rejected the court's holding, in accord with Pennsylvania law, respecting the burden of proof as to a release signed by the complainant. It was held that such burden was substantive in character.

Of similar import was the ruling of this Court in **McAllister v. Magnolia Petroleum Company,** 375 U. S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272, where the application of a Texas statute of limitations was applied.

Here, the Circuit Court adopted the words of the Georgia statute and did so by wringing from them their import and intended meaning as declared by the highest courts of the State.

We respectfully call attention to the dissenting opinion of Judge DeVane (App. p. 34 infra).

Doubtless, the meaning, changing complex and legislative history of the Georgia statutes here examined, are illustrative of like circumstances involving the statutes of the other States. In some, the statutes are penal; in others the amount of recovery is limited; in still others the right is given upon fulfillment of conditions precedent, and to persons of different capacities.

The rights granted to the complainant by the Circuit Court are rooted in Georgia law, and it is doubted that a Federal question even "lurks". The Courts of Georgia are open to the complainant for the assertion of her "state created" statutory rights.

We respectfully urge that the judgment of the Court of Appeals is an exemplum of what should be avoided. "Certainly sound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence." **Romero v. International Terminal Operating Co.**, 358 U. S. 354, 79 S. Ct. 468, 482, **3 L. Ed. 2d 368.**

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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OPINION.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 18620.

Hattie Brazier, Appellant,

versus

W. B. Cherry et al., Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(July 7, 1961.)

Before Jones and Brown, Circuit Judges, and DeVane, District Judge.

Brown, Circuit Judge: This case raises squarely the question whether death resulting from violation of the Civil Rights Statutes gives rise to a federally enforceable claim for damages sustained by the victim during his lifetime, by his survivors, or both. The District Court by sustaining a motion to dismiss for failure to state a claim, F. R. Civ. P. 12 (b), and for want of jurisdiction over the claim, answered this broadly in the negative. **Brazier v. Cherry**, M. D. Ga., 1960, 188 F. Supp. 817.

The complaint may be severely compressed since for these motions it was taken as true. The suit was by the surviving widow individually and as administratrix of

the decedent's estate. Sued as defendants were the Sheriff of Terrell County, Georgia, the Chief of Police of Dawson (Terrell County), Georgia and three police officers plus an insurance company as surety on the Sheriff's official bond. It charged that about April 18, 1958, two of the police officers acting under color of state laws illegally arrested the decedent and while in their custody wilfully and brutally attacked him without cause. These actions were intended to, and did, deprive the decedent of the rights and privileges of being secure in his person, of due process and equal protection of the law. Thereafter on April 20, 1958, all five of the named defendant officers conspired to deprive decedent of rights secured by the Constitution and laws of the United States when, with intent to discriminate against him, they removed him illegally from jail and beat him to the point of unconsciousness. From these injuries decedent died a few days later on April 25, 1958. The decedent was gainfully employed at a monthly salary of $300 and had a life expectancy of 33.68 years. Damages in the total sum of $180,448 were sought.[1] The suit was filed nearly two years later, April 19, 1960.

Jurisdiction was formally invoked under 28 U. S. C. A., § 1331 as a suit with requisite jurisdictional amount arising under the Constitution and laws of the United States and also under 28 U. S. C. A., § 1343 (1), (2), (3) and (4).[2]

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[1] The complaint formally broke down this demand as follows: (a) for "savagely brutal injuries * * * as well as his illegal arrest," $10,000; (b) "For general damages for the death" of decedent, $120,448; and (c) "Smart Damages for aggravation, suffering mental anguish, and other punitive damages," $50,000.

[2] § 1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen

In connection with the latter the complaint made specific reference to 42 U. S. C. A., § 1983,[3] § 1981,[4] and § 1985 (3).[5]

of the United States by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

[3] 52 U. S. C. A., § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law suit in equity or other proper proceedings for redress." R. S., § 1979.

[4] 42 U. S. C. A., § 1981. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and ex-actions of every kind, and to no other." R. S. § 1977.

[5] 42 U. S. C. A., § 1985 (3). "If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." R. S., § 1980.

While 42 U. S. C. A., § 1986[6] was not expressly cited, the complaint, construed as it must be, **Conley v. Gibson**, 1957, 355 U. S. 41 at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80, was sufficient to invoke it as well. **Baldwin v. Morgan**, 5 Cir., 1958, 251 F. 2d 780 at 790, 791; **Lewis v. Brautigam**, 5 Cir., 1955, 227 F. 2d 124 at 128.

The law has long and frequently stated and restated its apologia that claims for injury to the person die with the victim and that amelioration of the harshness of this principle must come from legislation. **Van Beeck v. Sabine Towing Co.**, 1937, 300 U. S. 342, 57 S. Ct. 452, 81 L. Ed. 685, 1937 A. M. C. 311; **Emerson v. Holloway Concrete Products Co.**, 5 Cir., 1960, 282 F. 2d 271 at 274, cert. denied, 364 U. S. 941, 81 S. Ct. 459, 5 L. Ed. 2d 372.

We are dealing, therefore, with statutory interpretation. If that process were merely one of searching for an express, categorical provision, the case would quickly end, and for that matter, so would a considerable amount of the business of judging. For it has to be acknowledged that save for § 1986, note 6, supra, which refers specifically to

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[6] 42 U. S. C. A., § 1986. "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;* and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." R. S., § 1981.

See note 12, infra, as to portion marked with *.

"legal representatives" of the person injured and a one-year right of action for $5,000 damages for "death * * * caused by * * * wrongful act and neglect," the other sections do not expressly refer to actions for death or the survival of claims arising from civil rights violations. It then becomes a question whether in these statutes or related acts Congress has impliedly established a right of survival.[7]

Relevant to that search, of course, would be the question whether the statutes under scrutiny not only fail to prescribe survival but, on the contrary, reflect a purpose negativing survival. That approach epitomizes one of the arguments vigorously pressed in support of the District Court's judgment. The defendants point to the fact that in § 1983, note 3, supra, the civil sanction afforded prescribes that the violator "shall be liable to the **party injured.**" Likewise, they urge that § 1985 (3), note 5, supra, accords the right of "an action for the recovery of damages" to the "party so injured or deprived." On these rather precise words it is then argued that this reflects a careful discriminating selection by Congress. Consequently, the argument runs, Congress purposefully extended the sanction of a civil damage suit only to the person who was the immediate physical victim of such violations. Additional strength to this contention is then found in § 1986, note 6, supra, which expressly recognizes survival and makes provision for suit after death. This is the assertion of the familiar and related rules that specific mention with respect to a specific situation impliedly excludes application generally or elsewhere.

Of these and similar approaches, we should give heed to the words of Mr. Justice Jackson for the Court in **SEC**

[7] The term is here used broadly as an abbreviation to include both of the district claims for (a) the damages sustained by a decedent during his lifetime and (b) damages sustained by his survivors as a result of his death. See note 15, infra.

v. Joiner Leasing Corp., 1943, 320 U. S. 344 at 350-51, 64 S. Ct. 120, 88 L. Ed. 88. "Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[8]

In that light—and without regard to the final question whether survival was adequately accorded by some statute—it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.[9]

We have fresh evidence of the broad and sweeping aims of Congress with specific regard to § 1983. **Monroe v. Pape,**

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[8] See note 8, 320 U. S. 344 at 351, which cites Supreme Court cases rejecting for particular statutes the "ejusdem generis" and the "expressio unius est exclusio alterius" maxims.

[9] Compare the criminal sanction, 18 U. S. C. A., § 242, for wilful deprivations paralleling the civil sanction under § 1983. Baldwin v. Morgan, 5 Cir., 1958, 251 F. 2d 780, at 789, notes 10 and 11. The celebrated case of Screws v. United States, 1945, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, recognized criminal accountability for violations resulting in death of the victim. So, too, did Crews v. United States, 5 Cir., 1947, 160 F. 2d 746.

1961, ... U. S. ..., ... S. Ct. ..., 5 L. Ed. 2d 492, makes an extensive re-examination of the legislative history and summarizes its purpose in this way. "The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies." ... U. S. ..., 5 L. Ed. 2d 492 at 501. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the federal one is invoked." 5 L. Ed. 2d 492 at 503.

With a clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights, where then do we find the statutory machinery to give effective redress after death? We find it unnecessary to pass on the historically documented contention[10] of the plaintiff that § 1986, note 6,

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[10] This argument stresses remarks made by Representative Poland, a member of the Second Joint House Senate Conference Committee proposing a substitute for the Sherman Amendment, see Congressional Globe, 42nd Cong., 1st Sess., at 804; Representative Shellaberger, Manager of the bill in the House, ibid. at 805; and Senator Edmunds, sponsor in the Senate, ibid. at 820; see also ibid. at 807.

On this thesis the plaintiff overcomes the one-year limitation period by contending that this refers to the "section" and not to the Act, other portions of which have been held to be controlled by the appropriate state statute of limitations, citing O'Sullivan v. Felix, 1914, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; Johnson v. Yeilding, N. D. Ala., 1958, 165 F. Supp. 76. Countering this defendants urge that the phrase "this section" in § 1986, note 6, supra, occurs in the codification but not in the original Act, so that under the Codification Act, Vol. 1-4, U. S. C. A., pp. 3, 4, the original prevails. United States v. Hirsch, 1879, 100 U. S. 33, at 35, 25 L. Ed. 539; United States v. Bowen, 1880, 100 U. S. 508, at 513, 25 L. Ed. 631.

supra, by its incorporating reference to the "second section of this act"[11] grants a general right of action either "to the person injured" or "his legal representatives" in the broad terms of the first clause without the time or monetary limitations set forth in the proviso.[12] This is so because we are of the clear view that Congress adopted as federal law the currently effective state law on the general right of survival. This was done by § 1988.[13] With respect to vindication

[11] This phrase appears in the recodification, see note 6, supra, as "mentioned in section 1985 of this title". It incorporates § 1985 (3), note 5, supra.

[12] The portion appearing after * in present § 1980, note 6, supra, was enacted as follows: "Provided, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person."

[13] As recodified it now reads:

42 U. S. C. A., § 1988. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." R. S., § 722. Acts Apr. 9, 1866, c. 31, § 3, 14 Stat. 27; May 31, 1870, c. 114, § 18, 16 Stat. 144.

This was originally enacted as § 3 of the Act of 1866. The declaration of substantive rights was contained in § 1 of the Act of 1866 which together with § 16 of the Act of May 31, 1870 is presently codified as 42 U. S. C. A. § 1981, see note 4, supra. As to § 1988, see Monroe v. Pape, 1961, ... U. S. ..., at ... S. Ct. ..., 5 L. Ed. 2d 492, at 541, and note 79 (dissenting opinion) which sets out portions of its original text.

of federally guaranteed civil rights, Congress provided that in all cases where the laws of the United States are "suitable to carry the same into effect" but are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law" then the "common law, as modified and changed by the Constitution and statutes of the State" in which the federal court is sitting "so far as the same is not inconsistent with the Constitution and laws of the United States" are to "be extended to and govern * * * the trial and disposition" of the case.

In determining the impact of this section on our specific problem, we should bear in mind again that we are concerned solely with statutory interpretation. Without a doubt Congress has the constitutional power to spell out a comprehensive right of survival for civil rights claims. The question is therefore one of the everyday variety: has it done so by this means? Since legislation has been the invited response to ameliorate the harshness of the general rule against survival in the case of injury to person, it is certainly natural that, with respect to federally promulgated rights, the approach is hospitable toward finding a plausible, reasonable basis upon which to sustain an effective enforceable right. Certainly for the last two decades Judge Cardozo's words in **Van Beeck v. Sabine Towing Co., supra,** 300 U. S. 342 at 350-51, set the tone. "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system."

At every turn the Supreme Court, by drawing on available state legislation or giving a broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era. In **Just v. Chambers**, 1941, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903, the Court as to the related problem of survival of the cause of action after the death of the tort-feasor held that admiralty could call upon the local (Florida) law. In **Cox v. Roth**, 1955, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260, the question was the survival of a claim under the Jones Act, 46 USCA § 688, on the death of the tort-feasor. Since liability imposed against the vessel owner under the Jones Act rests on the incorporation of FELA, the Court was faced squarely with the bald fact that the basic Act had no provision for survival against the tort-feasor. Nevertheless, the dominant approach of the Court was that "* * * welfare legislation * * * is entitled to a liberal construction to accomplish its beneficent purposes." 348 U. S. 207 at 210. What could be said of the "extreme harshness of the old common-law rule abating actions on the death of the tort-feasor"[14] may be more than said as to the victim and his dependents. Likewise, may it be said that this rigor of the common law "flies in the face of the express congressional purpose to provide for"[14] protection of citizens against unconstitutional deprivation of their fundamental civil rights. The Court's awareness there that "literal application of the words of the FELA would result in the denial of recovery against the personal representative of the tort-feasor"[14] was not permitted to "frustrate the congressional purpose."[14] Nor should it here.

When we examine § 1988 in the dual spotlight of the historical major aim of the civil rights legislation, **Monroe**

[14] From 348 U. S. 207, at 209 and 210

v. Pape, supra, and the tolerant, hospitable construction to ameliorate the hardships of the common law rule, there is ample basis for concluding that this statute fills the gap. In fact, it is Georgia law, not federal law, which fills the gap.[15]

There is, first, nothing unusual about Congress adopting state law of the several states as federal law. It has done this, for example, in the Outer Continental Shelf Lands Act, 43 USCA § 1331-43 and especially § 1331 (a) (2), **Guess v. Read,** 5 Cir., 1961, ... F. 2d .... [No. 18466, May 18, 1961]. Likewise it has done so in the Federal Torts Claims Act where substantive liability of the Government is determined by state law. 28 USCA

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[15] § 3-505 (1958 pocket part) of the Georgia Code provides:

"No action for a tort shall abate by the death of either party, when the wrongdoer received any benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff; and in case of the death of the defendant shall survive against said defendant's personal representative * * *."

Section 105-1302 of the Georgia Code provides for a wrongful death action:

"A widow, or, if no widow, a child or children, minor or *sui juris*, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence." [Act 1850, Cobb 476; Acts 1855-6, page 155; 1878-9, page 59; 1924, page 60.]

"The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

These Georgia statutes prescribe separate and distinct causes of action. See note 7, supra. One is for survival of the decedent's cause of action; the other for injury inflicted upon the survivor. Complete Auto Transit, Inc. v. Floyd, 1958, 214 Ga. 232, 104 S. E. 2d 208 at 213; Spradlin v. Georgia Ry. and Electric Co., 1913, 139 Ga. 575, 578, 77 S. E. 799, at 800.

§§ 1346 (b), 2671-80. Similarly, priority as between private contract liens and the Government's lien for federal taxes is governed in large part by state law on recording and perfection. 26 U. S. C. A., § 6323. By 18 U. S. C. A., § 13, Congress has, with respect to so-called special maritime and territorial jurisdiction of the United States under § 7, made an act a federal crime if it would have been punishable as a crime at the time of the act under the laws of the state, territory, possession or district where committed. Only will such adoptive statutes encounter constitutional impediments.[18]

And since the power of Congress to legislate would generally be coextensive with the power of the Judiciary to fashion substantive law within an admitted field of federal competence, there is a vast body of law furnishing additional evidence that Congress considered it proper to look to the states in supplying the necessary survival mechanisms to make the civil rights policies effectual. This body of law is that by which recovery for death from injuries occurring on navigable waters is allowed in admiralty on the basis of local state death statutes. This serves as a significant analogy for our problem of reading the congressional intention of § 1988. For the development of this working principle in an area where the substantive rights are within the Supremacy Clause, **Kossick v. United Fruit Co.**, 1961, ... U. S. ..., ... S. Ct. ..., ... L. Ed. ... [No. 96, April 17, 1961], and therefore as "federal" as under the civil rights statutes, has not been too troubled by whether the state law thereby adopted is substance or procedure. Indeed, while the conceptual

[18] See, for example, Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834; State of Washington v. W. C. Dawson & Co., 1924, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403, which involved unsuccessful congressional efforts adopting state compensation acts to overcome Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086; see also 50 Am. Jur., Statutes, §§ 36-39, at 57-59.

status is far from clear, it would be doctrinaire to assert that this wholesome end rest upon the notion that nothing but state procedural law is thereby adopted.[17] The lesson that this judicial inventiveness teaches is, of course, that if one coordinate branch of the Federal Government conceives it to be desirable and permissible to draw on local state law to give its federally-declared rights effective value, then Congress may have done likewise here. And in doing so, it was not necessary that Congress either acted—or thought about it—in terms of substance, procedure, jurisdiction, or all three.

Indeed, § 1988 uses sweeping language. It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes. If the federal law is "suitable to carry the [policy] into effect" resort to local law is not required. On our analysis federal law is not suitable, i. e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal statutory framework is, in the words of the statute, "deficient in the provisions necessary to furnish suitable remedies and punish offense against" that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies.

There is nothing in this comprehensive declaration of a purpose to make a policy fully effective which would

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[17] The most recent cases are Tungus v. Skobjard, 1958, 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2nd 524; United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki, 1959, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541; Hess v. United States, 1960, 361 U. S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305; Goett v. Union Carbide Co., 1960, 361 U. S. 340, 80 S. Ct. 357, 4 L. Ed. 2d 341. See Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F. 2d 42, at 47, note 6, and Emerson v. Holloway Concrete Products Co., 5 Cir., 1960, 282 F. 2d 271, at 281, notes 10 and 11 (dissenting), for a summary of the changing position of the several Justices.

justify reading the single word "remedies" in a literal sense. It is hardly consistent with the diverse convictions so deeply felt and often spoken by ardent champions of the competing forces in the stormy struggle culminating in the Civil Rights Acts, see **Monroe v. Pape, supra**, to think that they were consciously legislating in terms of the mechanisms or devices generally associated in the lawyer's mind with procedure as such.[18] The term "suitable remedies" had a deeper meaning. Used, at it was in parallel with the phrase "and punish offenses against law," it comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes. And in a very real sense the utilization of local death and survival statutes does not do more than create an effective remedy. This is so because the right is surely a federally protected one — the right to be free from deprivation of constitutional civil rights. The local death or survival statute adopted by reference in this fashion does not add to that substantive right. It merely assures that there will be a

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[18] As a statute incorporating merely state procedural mechanisms or devices, § 1988 was, at least for actions at law, superfluous as a duplication upon the enactment of the Conformity Act. Section 5 of the Conformity Act of 1872, dealing with methods of instituting and carrying on litigations provided: "The practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the * * * district courts of the United States shall conform, as near as may be, to the practice * * * existing at the time in like causes in the courts of record of the State within which such * * * district courts are held, any rule of court to the contrary notwithstanding." 17 Stat. 196, 197 (1872), 28 U. S. C., § 724. As originally passed this section contained a proviso that "nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof." This clause was dropped in 1878. U. S. Rev. Stat., § 914 (1878). See the discussion of the history of the Act in McCormick & Chadbourn, Federal Courts 484-487 (1957). The Conformity Act was repealed by the 1948 revision of Title 28 of U. S. C. because its provisions were in conflict with the Federal Rules and no longer had any force or effect. See 2 Moore, Federal Practice, § 2.04 at 319-331.

"remedy"—a way by which that right will be vindicated if there is a violation of it.

One further thing should be emphasized. In enacting this legislation by reference to incorporate that of the several states currently in effect when and where a civil rights case would arise, Congress was under no restraint in enacting procedural, i. e., remedial, rather than substantive legislation or vice versa.[19] Consequently, it does not really matter whether in the eyes of the local law the local statute, rule or decision thus incorporated by reference is in the category of substance, or procedure, or mixed.[20] Congress adopts the whole "common law, as modified and changed by the constitution and statutes of the State" without regard to its technical local characterization. From a federal standpoint the only limitation upon the use of such adoptive state legislation rule or decision is that it is suitable to carry the law into effect because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b)

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[19] Congress, of course, was not concerned with any limitation on powers such as it placed on the Supreme Court rule-making power by the Enabling Act, 28 U. S. C. A., § 2072.

[20] The defendants stress Barnes Coal Corp. v. Retail Coal Merchants Assn., 4 Cir., 1942, 128 F. 2d 645, at 648, and Gerling v. Baltimore & Ohio Railroad, 1894, 151 U. S. 673, at 692, 14 S. Ct. 533, 38 L. Ed. 311; Michigan Central R. Co. v. Vreeland, 1913, 227 U. S. 59, at 67, 33 S. Ct. 192, 57 L. Ed. 417, which speak in terms of survival as a matter of substantive right, not procedure. These really beg the question. As we view § 1988 it incorporates the right of survival under the state statute as part of the federal Act. It is the federal Act, utilizing state law as it does, which gives this *right*. Therefore it is of no consequence whether survival is classified as a matter of right or procedure.

state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.

Thus, by a similar if not altogether parallel route, we give to § 1988 a reach equivalent to that accorded by the 8th Circuit recently in **Pritchard v. Smith**, 8 Cir., 1961, ... F. 2d ... [No. 16637, April 26, 1961, 29 L. W. 2534], as it dealt with the related problems of survival of a civil rights claim after the death of the tortfeasor.

Since Georgia now provides both for survival of the claim which the decedent had for damages sustained during his lifetime as well as a right of recovery to his surviving widow and others for homicide, see note 15, **supra**, we need not differentiate between the two types of actions. See 16 Am. Jur., **Death**, § 61, at 47-48. To make the policy of the Civil Rights Statutes fully effectual, regard has to be taken of both classes of victims. Section 1988 declares that this need may be fulfilled if state law is available. Georgia has supplied the law.

This makes it unnecessary to pass on the alternative grounds of jurisdiction on the basis of diversity against the surety of the Sheriff or pendent jurisdiction. The cause must therefore be reversed and remanded for a trial and other further consistent proceedings. Experience teaches us that we should reiterate that nothing said or unsaid, expressed or implied is a determination, holding or intimation, one way or the other, on the merits of the cause. That is for the trial court on the trial now to be had. **Fontainebleau Hotel Corp. v. Crossman**, 5 Cir., 1961, 286 F. 2d 926 at 928; **United States v. Bowen**, 5 Cir., 1961, ... F. 2d ... [No. 18588, May 2, 1961].

Reversed and Remanded.

DeVane, District Judge, Dissenting:

Convinced as I am that District Judge Bootle decided the issues in this case correctly, I am compelled to dissent from the opinion of Circuit Court Judge Brown, Judge Bootle passed directly upon every issue submitted to him by the parties in the case which did not include the issue upon which this Court holds our decision must turn.

The complaint filed in the case placed no reliance whatever upon 42 U. S. C. A. 1988. The section was not mentioned in the pleadings. It was an afterthought on the part of counsel for appellant. However, giving full effect to this section, it cannot be held to create a cause of action in this Court based upon the Georgia Survival Statute. Such a holding by this Court constitutes nothing short of judicial legislation.

Sections 1981, 1983 and 1985 (3), 42 U. S. C. A., are the Civil Rights sections relied upon by plaintiff in the complaint filed herein to sustain this cause of action. Section 1981 creates no cause of action. Sections 1983 and 1985 (3) create causes of action for "the party injured" and for no one else.

This is made doubly clear when consideration is given to 42 U. S. C. A. 1986. This section provides that not only the wrongdoers but "every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do" may be joined as defendants and sued for the wrongful acts complained of. This section specifically provides that if the death of any party be caused by such wrongful act or neglect "the legal representatives of the deceased shall have such action therefor and may recover not exceeding $5,000.00 damages therein, for the benefit of the widow of the deceased, if there be one,

and if there be no widow, then for the benefit of the next of kin of the deceased."

This is the only section in the Civil Rights Act that provides for a survival action for the benefit of legal representatives of the deceased. This clearly is sufficient proof that Congress never intended to provide for the survival of a cause of action in case of death of the injured person other than that specified therein. This section goes further and provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

What this Court is doing in this case is circumventing the purpose and effect of this section by holding that Section 1988 gives to the injured parties the benefit of the Georgia law with reference to survival and by so doing completely avoids the provisions of Section 1986 limiting the amount of recovery specified therein and the statute of limitations as provided therein.

What is most disturbing to me with reference to this decision is that it is further proof of the fact that federal appellate courts are engaging too much in amending the Constitution and laws where, in their opinion, there is need for the amendment, instead of interpreting the laws as given us by the Constitution and the Congress.

I would affirm.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth
Circuit, New Orleans, Louisiana.

Aug. 7, 1961

(Seal)

LETTER FROM CLERK.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

August 7, 1961

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleans 6, La.

Mr. Charles J. Boch
Attorney at Law
P. O. Box 1353
Macon, Georgia

Re: No. 18620—Hattie Brazier vs.
W. B. Cherry, et al.

Dear Sir:

Pursuant to your application for stay of mandate in the referenced cause, the Court on August 5, 1961 entered an order staying its mandate for a period of sixty (60) days from that date. Enclosed is a copy of the Order as entered.

Also enclosed is a certified transcription of record which includes the proceedings had in this Court; and a copy of the Opinion, Judgment, and Order Denying Rehearing, which should be printed as an appendix to your petition for writ of certiorari as provided for by the rules of the Supreme Court.

I am enclosing nine additional, uncertified copies of the printed record. A statement in the amount of $9.40 is enclosed to cover the cost of certifying the proceedings and the extra opinion, which I ask that you please remit.

Please acknowledge receipt.

Very truly yours,

Edward W. Wadsworth,
Clerk.

EWW:mm

Enc.

cc: Mr. D. L. Hollowell
Mr. C. B. King
Mr. Thurgood Marshall
Mr. Jack Greenberg

JUDGMENT.

Extract from the Minutes of July 7, 1961

Hattie Brazier

No. 18620 versus

W. B. Cherry, et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a trial and other further consistent proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, W. B. Cherry, and others, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"DeVane, District Judge, Dissenting."

ORDER DENYING REHEARING.

(Filed July 28, 1961.)

In the United States Court of Appeals
For the Fifth Circuit.

No. 18,620.

Hattie Brazier,
Appellant,
vs.
W. B. Cherry et al.,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(July 28, 1961.)

On Petition for Rehearing.

Before Jones and Brown, Circuit Judges, and DeVane, District Judge.

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby Denied.

Judge DeVane dissenting.

ORDER STAYING MANDATE.

(Filed August 7, 1961.)

United States Court of Appeals
For the Fifth Circuit.

Hattie Brazier,

Appellant,

versus

No. 18,620.

W. B. Cherry et al.,

Appellees.

On Consideration of the Application of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 5 day of August, 1961.

s John R. Brown,
United States Circuit Judge.